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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BENJAMIN RAMIREZ MARTINEZ, Defendant and Appellant.	E063393 (Super.Ct.No. RIF1313983) OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge. Affirmed.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, and Alan L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Benjamin Ramirez Martinez of two counts of sexual intercourse with Jane Doe, his girlfriend's granddaughter, a child 10 years old or younger (Pen. Code, § 288.7, subd. (a), counts 1, 2), as well as six counts of lewd and lascivious conduct upon Doe and her sister, both 14 years old or younger (§ 288, subd. (a), counts 3-8).[1] The trial court sentenced Martinez to 150 years to life in state prison and ordered him to pay $100,000 in restitution to Doe.

Martinez admitted to one act of sexual intercourse with Doe. His appeal is limited to challenging his conviction on the second section 288.7, subdivision (a) count on the ground the prosecution did not present substantial evidence he committed a second act of sexual intercourse with her. The parties agree reversing the conviction would not affect the length of Martinez's sentence because the trial court stayed the sentences on both section 288.7, subdivision (a) convictions under section 654. However, Martinez contends the second conviction affected the trial court's decision to award $100,000 in restitution to Doe and therefore requests we reverse the conviction and remand for resentencing.

We affirm.

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[1] Unlabeled statutory citations refer to the Penal Code.

I

FACTUAL BACKGROUND

The Riverside County District Attorney charged Martinez with two counts of sexual intercourse with a child 10 years old or younger (§ 288.7, subd. (a), counts 1, 2) and six counts of lewd and lascivious conduct upon a child 14 years of age or younger (§ 288, subd. (a), counts 3-8). Doe was the victim of Martinez's offenses in counts 1 through 4, including both counts of sexual intercourse with a child. Her sister was the victim of Martinez's offenses in counts 5 through 8.[2] The People also alleged Martinez committed "a qualifying sex offense as specified in Penal Code section 667.61, subdivision (c), against more than one victim, within the meaning of Penal Code section 667.61, subdivision (e), subsection (4)."

Doe often stayed with her grandmother and Martinez, who was the grandmother's boyfriend. Doe was four years old at the beginning of this period and eight years old at the end. Doe reported to her aunt and mother that Martinez had sexually abused her. On November 20, 2013, when she was seven years old, Doe underwent a forensic interview with a social worker, which the People recorded and played for the jury.

Doe told the social worker "when we lived with my grandma . . . I always go to the downstairs to go the bathroom and then [Martinez] put me in [my sister's] room and started to touch me." The social worker asked Doe to "[t]ell me everything about the

[2] Martinez does not appeal his convictions or sentences for lewd conduct with a child 14 years of age or younger and they are not relevant to the issue on appeal, so we forgo discussing the facts related to those charges.

touching the first time he did it." Doe responded, the "first time was when my grandma was outside . . . [a]nd the second time was when my grandma was inside." The social worker responded, "Okay. So let's talk about the first time" and asked, "you said, um, [Martinez] took you into the room? Um, how old were you when that happened?" Doe, who was seven at the time of the interview, said she was six years old when the incident occurred. Doe described the incident in the following exchange:

"[Q]: When he took you into your sister's room, what's the first thing he did?

"[A]: He touched me.

"[Q]: He touched you? Tell me how he touched you this time and the first time.

"[A]: Um, what does that mean?

"[Q]: The first time he touched you in your sister's room, how did he touch you?

"[A]: Um, with his private too.

"[Q]: With his private? Where's his private at? Okay. So tell me about how his private touched your private.

"[A]: He got on me.

"[Q]: He got on you? Okay. So where were you in your sister's room when he got on you?

"[A]: On the – on the bed.

"[Q]: On the bed? Tell me how you got on the bed.

"[A]: He just put me on the bed.

"[Q]: He just put you on the bed? Okay. So he put you on the bed and what did he do with your clothes?

"[A]: He took 'em off.

"[Q]: He took off your clothes? Which clothes did he take off?

"[A]: My shirt, my underwear, my pants.

"[Q]: Your shirt, your pants and your underwear? Okay. So after he put you on the bed and took off your shirt, your pants and your underwear, what did he do?

"[A]: He touched me. [¶] . . . [¶]

"[Q]: Was there any hurting to your body anywhere? Where? And what is that called?

"[A]: Private.

"[Q]: So there was hurting to your private? What was making your private hurt?

"[A]: His private."

Doe also told the social worker Martinez touched her "private" with his "butt" on that occasion.

Doe told the social worker Martinez had touched her on more than one occasion. She said he touched her vagina with his penis "[l]ike, a thousand times," and said "[i]t would hurt" and that "[h]is private" made it hurt. The social worker followed up by asking, "you told me it happened a lot of times. Tell me about another time that he did that to you." Doe responded, "That's all. I don't know when." The social worker asked, "[H]ow old were you when it stopped?" Doe responded, "Seven."

Doe later told the social worker about another occasion when she was five years old.

"[Q]: Tell me what his body was doing when it was on top of you and his private was in your private.

"[A]: I don't know.

"[Q]: Okay. Was his body – never mind that, I'm not gonna ask that . . . [T]ell me about what he would tell you when he did that to you.

"[A]: He said, 'Don't tell anybody – don't tell anybody.'

"[Q]: He said, 'Don't tell anybody'? Did he say what would happen if you told?

"[A]: He said he would spank me. [¶] . . . [¶]

"[Q]: [H]e said he would spank you if you told? When did he tell you that?

"[A]: When I was on the bed.

"[Q]: When you were on the bed? Okay. How old were you when that happened? When he told you that?

"[A]: I was 5."

At trial, the prosecution asked Doe, "How many times do you remember [Martinez's] privates touching your privates?" Doe responded, "I don't know how many times." The prosecution then asked whether she thought it was more than one time, more than two times, and more than three times. To each question, Doe responded, "Yes."

On November 26, 2013, Riverside County police detectives interviewed Martinez. The prosecution played a video recording of the interview for the jury and provided a

transcript of the interview.[3] Martinez eventually admitted touching both girls' genitals on several occasions. In the following exchange, he also admitted to inserting part of his penis into Doe's vagina on one occasion:

"[Q]: Okay and when you say that you touched [Doe's vagina], in the photos it showed that you put it in just a little bit . . . it could have just been the head part of the penis that you put inside but it didn't go in . . .

"[A]: No.

"[Q]: Because if you had gone in all the way you would have hurt her, she would have more wrong things with her.

"[A]: Mm hmm (affirmative)

"[Q]: But, about how . . . how much of your penis did you put in. . . .

"[A]: No. I didn't . . . no . . .

"[Q]: About how . . . how much do you think, if this were your penis . . .

"[A]: No.

"[Q]: How do you think (unintelligible)

"[A]: No, for the most part just like this, just a little.

"[Q]: So just a little?

"[A]: Yes.

"[Q]: Okay. So about how much would you say, if that finger were your penis . . . about how much of your tip do you think you inserted?

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[3] Police conducted the interview in Spanish and the person who transcribed it translated it into English. We include only the English translation.

"[A]: Well just to about right here, that's all.

"[Q]: Okay.

"[A]: I just . . . I just took it out and I touched it like this and that's all that I did.

"[Q]: And how many times did this happen with Jane Doe?

"[A]: One time."

At trial, Detective Lomelli, who participated in the interview, testified Martinez indicated using his finger that his penis penetrated Doe's vagina a length corresponding to "the complete entire top portion, top bone portion of [the] right index finger from the joint to the tip."

The jury found Martinez guilty of two counts of sexual intercourse with Doe, as well as all six counts of lewd and lascivious conduct upon Doe and her sister. The jury also found Martinez committed a qualifying sex offense within the meaning of section 667.61, subdivision (c), against more than one victim, within the meaning of section 667.61, subdivision (e)(4). The trial court sentenced Martinez to 150 years to life in state prison and ordered him to pay $100,000 in restitution to Doe.

II

DISCUSSION

Martinez contends we should reverse his conviction on one of the two counts of sexual intercourse because the prosecution presented insufficient evidence to sustain the jury's finding that he committed more than one act of intercourse with Doe. We disagree.

On a challenge to the sufficiency of evidence supporting a conviction, we '"examine the whole record in the light most favorable to the judgment to determine

whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Houston* (2012) 54 Cal.4th 1186, 1215.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*People v. Holt* (1997) 15 Cal.4th 619, 668.) This standard is high, requiring an appellate court to "accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*People v. Combs* (2004) 34 Cal.4th 821, 849.)

"The elements of sexual intercourse or sodomy with a child 10 years of age or younger (§ 288.7, subd. (a)) are: (1) The defendant engaged in an act of sexual intercourse or sodomy with the victim; (2) when the defendant did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old. [¶] Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis." (*People v. Mendoza* (2015) 240 Cal.App.4th 72, 79.) It is uncontested that Doe was less than 10 years old and Martinez was older than 18 years old at the time of these events.

Martinez admitted to committing one act which the jury reasonably could have concluded was sexual intercourse. He admitted inserting his penis into Doe's vagina to a depth corresponding to "the complete entire top portion, top bone portion of [the] right

index finger from the joint to the tip." Doe testified Martinez put her on the bed, got on top of her, touched her "private" with his "private," and testified that the touching hurt her. Her testimony also was sufficient to allow a reasonable jury to conclude Martinez committed sexual intercourse upon her.

That leaves us to determine whether the prosecution presented sufficient evidence from which the jury reasonably could conclude Martinez committed sexual intercourse upon Doe a second time. We have reviewed the record and conclude it did. The critical evidence on this point came from Doe during her forensic interview. The social worker asked Doe, "[Y]ou told me that his private touched your private. Did he do that one time or more than one time?" Doe responded, "Like, a thousand times." The social worker then asked, "What would his private be doing when it was touching your private?" Doe responded, "It would hurt" and also told the social worker '[h]is private" was what hurt her. A jury could reasonably conclude from the child's statement that Martinez touched her private with his private "like a thousand times" that she meant he had touched her on numerous occasions. The social worker evidently understood her that way, because she responded to Doe's answer by asking, "What makes you remember he did it a lot of times?" Doe's statement that Martinez's penis "would hurt" her vagina on those occasions gave the jury a reasonable basis to conclude that the additional occasions to which Doe referred involved penetration.

These statements by Doe did not stand alone. The first instance of sexual intercourse Doe described to the social worker occurred when she was six years old. After Doe reported Martinez hurt her vagina with his penis numerous times, the social

worker followed up by asking, "you told me it happened a lot of times. Tell me about another time that he did that to you." Doe responded, "That's all. I don't know when." The social worker then asked, "[H]ow old were you when it stopped?" Doe responded, "Seven." At trial, Doe testified she remembered Martinez's "privates touching [her] privates" more than three times. In addition, during her forensic interview, Doe described an incident she said occurred when she was five years old. The social worker asked, "Tell me what his body was doing when it was on top of you and his private was in your private?" Doe responded, "I don't know." The social worker then asked her to "tell me about what he would tell you when he did that to you," and Doe responded, "He said, 'Don't tell anybody – don't tell anybody'" and "He said he would spank me." The social worker asked, "How old were you when that happened? When he told you that?" Doe responded, "I was 5."

Though Doe first said the incident when she was six years old was the first incident of touching, and the jury could have concluded she was confused about her age and the incidents were identical, the jury was not required to reach that conclusion. The jury could also reasonably have concluded Doe was confused about which incident occurred first, but had described separate incidents of molestation. We are required to accept logical inferences the jury might have drawn from the evidence even if we would have reached a contrary conclusion. (*People v. Combs*, *supra*, 34 Cal.4th at p. 849.) In combination with Doe's statement that the abuse occurred often, we conclude these statements about incidents when she was five and seven years old gave solid, credible evidentiary support to the jury's verdict.

Defendant contends there was insufficient evidence of a second incident of sexual intercourse because at trial Doe "testified that no part of appellant's privates ever went inside her privates or any other part of her body." This testimony does not undermine the jury's conclusion. At trial, the prosecution asked Doe whether Martinez's privates ever went "inside your privates" in the way a key goes inside a lock. Doe responded, "No," and also testified she did not remember what Martinez did with his penis on her vagina. Martinez's own statement regarding his conduct with Doe was sufficient to support the jury's conclusion that he committed sexual intercourse, as was Doe's description of Martinez as hurting her vagina with his penis. The jury was free to credit the statements Martinez and Doe made closer to the events. It was also free to conclude Doe did not understand the lock-and-key analogy. Though we might reach a different conclusion, we are not permitted to substitute our own judgment for the judgment of the jury. (*People v. Banks* (2014) 59 Cal.4th 1113, 1156, abrogated on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 386.)

Defendant also contends "a change in the number of counts involving intercourse undermines part of the trial court's reasons for selecting the amount of restitution and the matter should be remanded to allow the court to reevaluate its determination of the amount." We do not reach this issue because we affirm the conviction on the second count of intercourse with a child 10 years old or younger.

III

DISPOSITION

We affirm the judgment.

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SLOUGH
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.